Dear Ruth,


I am grateful to the Committee for conducting such an extensive inquiry in response to the Commission on Parliamentary Reform’s recommendation to promote a stronger human rights role for the Parliament and for its thorough and considered report. It is fitting as we reach our 20th anniversary that the Parliament revisits and looks to develop its role as a human rights guarantor and I very much welcome the direction of travel reflected in the Committee’s Report.

Thank you for inviting my views on those aspects of the Report that touch on my responsibilities. I am keen to take the opportunity to respond immediately to recommendation 23 which proposes that the Presiding Officer’s statement on legislative competence be as expansive as possible to provide the public and the Parliament with an understanding of the Presiding Officer’s views on human rights issues relating to Bills.

I hope it is helpful if I clarify my role and set out clearly the context in which my statement sits and the function it serves.

Under section 31(2) of the Scotland Act 1998, I am required to make a statement on the introduction of any Bill, as to whether its provisions would be within the legislative competence of the Parliament. As noted in the report, section 29 of the Act makes clear that legislative competence is central to the validity of Acts passed by the Scottish Parliament. Provisions of an Act of the Parliament which are outside legislative competence are not law and have no legal effect.
My statement is one of the checks and balances set out in the legislative process to provide reassurance to Members that the legislation that the Parliament passes is technically valid and therefore will have legal effect. It is not my function to guide or direct Parliament in its scrutiny of policy matters. In coming to my view, it is therefore not for me to take into account whether there is a need for legislative action, nor to weigh up the merits of the Bill. It would be inappropriate for my statement to comment on such issues. These are properly matters for the Member in charge to explain in promoting their proposal and for Parliament to interrogate in the course of its scrutiny.

I am required to consider whether any provision of the Bill would be incompatible with Convention rights as defined in the Human Rights Act 1998. Convention rights are restricted to specified Articles of the European Convention on Human Rights and relevant protocols.

Two important limitations flow from this specific restriction. My statement on competence considers human rights in the context of legal validity and I am therefore neither required nor able to consider any issues relating to human rights as may be defined more broadly, for example as matters of social policy. Further, as the independent and impartial officer of the Parliament, it would be inappropriate for me to reflect on whether a particular proposal best supports, protects or promotes human rights or any other policy issue. In my statement I may only refer to provisions which raise such significant concerns regarding compatibility with Convention rights that I consider there to be a doubt as to their legal validity.

When defining the scope of the Presiding Officer’s function under section 31(2) of the Scotland Act, Parliament considered it would be impossible for the Presiding Officer to participate in parliamentary consideration of a Bill following introduction as this is a political process. The issuing of my statement on competence therefore fulfils my statutory duty to inform Parliament. From that point on, the exercise of legislative authority and consideration of any issues relevant to that, rests with the Parliament.

Given these limitations of my role, I am therefore unable to expand on the consideration of human rights as proposed by the Committee, save where I have significant concerns as to compatibility with Convention rights. Such cases are, as you would expect extremely rare. Should such a concern arise, I am required to identify the provisions of concern and offer reasons for my view.

As the Committee notes in its report, there are sound reasons why the legal advice that I receive is provided in confidence, and why it is protected. For these reasons, and in line with the practice adopted by both the Scottish and UK Governments, I do not publish the legal advice I receive.

The restrictions placed on me as Presiding Officer do not of course extend to parliamentary committees or to the Parliament itself. It is here where the important policy and scrutiny work can and must take place. I therefore consider the Report’s recommendations seeking to improve the availability and quality of information relating to human rights issues to committees and the Parliament, as key to supporting us to achieve a more proactive human rights culture.
I also note the recommendations regarding the resources that should be made available to your Committee. As you will be aware, all committees of the Parliament are supported by a team of officials (including those with legal expertise) who provide it with impartial advice. Should committees require it they may also apply for the appointment of policy advisers, including those with expertise in relation to human rights to support their work.

Thank you again to the Committee for its comprehensive report which will help support the Parliament to take a more active role in the implementation of human rights standards and judgments, as highlighted by the Commission on Parliamentary Reform.

Yours sincerely

Ken

Rt Hon Ken Macintosh MSP
Presiding Officer